FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 546

ALDEN D. STANTON and LOUISE M. STANTON,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BASIL O'CONNOR,
JOHN C. FARBER,
WILLIAM F. SNYDER,
CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

Of Counsel:
O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

Parrish Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

Table of Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .

ALDEN D. STANTON and LOUISE M. STANTON,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ALDEN D. STANTON and LOUISE M. STANTON pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below.

The findings of fact and conclusion of law of the District Court (R 69-70)[1] are not officially reported. However, there is a reported memorandum of the District Court on petitioners' motion for summary judgment reported at 137 F. Supp. 803 and printed R 12-16. The opinion of the Court of Appeals (Appendix, *infra*, p. 23) is reported at 268 F. 2d 727.

[1] "R" refers to the appendix to the appellant's brief in the Court of Appeals.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 6, 1959. On July 20, 1959, a timely petition for rehearing was filed and such petition for rehearing was denied July 30, 1959. Petitioners thereafter moved the Court of Appeals for leave to file a petition for rehearing *en banc*, which motion was denied October 22, 1959. Mr. Justice Harlan by order has extended the time within which to file a petition for writ of certiorari to and including December 27, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

Alden D. Stanton[2], two weeks after his resignation as comptroller of the Corporation of Trinity Church in Manhattan had been accepted, was voted $20,000 as a "gratuity" by the vestrymen of such Church in their capacity as vestrymen and also in their capacity as directors of the real estate holding subsidiary of the Church. The question is whether the $20,000 gratuity was a gift excludable under Section 22(b)(3) of the Internal Revenue Code of 1939, as found by the District Court after trial or whether it was income as determined by a divided Court of Appeals.

Also presented is the scope and application of Rule 52 of the Federal Rules of Civil Procedure with respect to fact determinations in tax cases.

---

[2] Louise M. Stanton is a party only because she filed a joint return with her husband.

Statutes Involved.

Internal Revenue Code of 1939 (26 U. S. C. Section 22, 1952 ed., as applicable for the years 1942 and 1943):

SEC. 22. *Gross Income.*

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter.

* * * * * *

(3) *Gifts, bequests, devises, and inheritances.* The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *.

RULE 52. *Federal Rules of Civil Procedure, Findings by the Court.*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclu-

sions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement.

Alden D. Stanton was responsible for the financial affairs of one of the oldest corporations in the nation, the Corporation of Trinity Church in Manhattan. He was its comptroller. He was also president of a real estate holding corporation wholly owned by Trinity Church (R 72). On November 5, 1942, he submitted his resignation in order to go into business for himself (R 42). His resignation was accepted, but he was asked to reconsider (R 25). Stanton adhered to his decision to resign.

Two weeks thereafter, on November 19, 1942, the members of the vestry who comprised the directors of Trinity Church's real estate holding company made a gift to him (R 72). The uncontradicted oral testimony was that the gift was an "evidence of good will" (R 42); that he "was liked by all of the members of the vestry personally" (R 30-31). The gift was in the amount of $20,000 and approximately half thereof was paid by the Corporation of Trinity Church and half by its subsidiary (R 13).

It was only after he had departed that any part of the gift was received. The gift was made and the delivery thereof authorized in accordance with the following preambles and resolution (R 72):

> "Whereas Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and
>
> "Whereas said resignations have been accepted, to be effective as of November 30, 1942;
>
> "Be it Resolved that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal installments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The resolution was drafted by Woolsey A. Sheppard, Esq., for many years a vestryman of and counsel to Trinity Church. Mr. Sheppard testified that it was the intention of the vestrymen to make Mr. Stanton a gift (R 30, 31).

Neither Trinity Church nor its subsidiary received any Federal tax benefit directly or indirectly, since both were charitable corporations exempt from income tax (R 26, 43). Payments were entered on the books of the donors as a gratuity (R 36, 37). Another vestryman and director stated that it was the unanimous intent of all of the directors to make Mr. Stanton a gift (R 40-41). Stanton did not vote

on the resolution (R 28). There was no withholding (R 26, 43) which would have been required from compensation. There was no business purpose in making the gift (R 28, 43). Stanton received his entire salary through the effective date of his resignation (R 25, 43). Stanton performed no services thereafter, nor did he refrain from doing anything (R 28, 42, 60, 63).

Stanton had no claim against Trinity or the operating company (R 24, 59). He did not request any payment (R 29) nor have any voice in voting it (R 28, 29, 43, 60). Stanton was held in high regard by the vestry and the directors (R 30, 31, 42).

The directors and vestry felt he had come in when Trinity's affairs were in a "difficult situation" and had done "a splendid piece of work" (R 31). Stanton also considered the payments a gift (R 60) and so designated them on his tax returns (R 63, 64).

The case may be summarized in

(a) the resolution set forth on page 5 hereof awarding a "gratuity".

(b) the testimony of Woolsey A. Sheppard, Esq., counsel who drafted the resolution, who voted for the resolution as a director of the operating company and who ratified it as a member of the vestry (R 30-31):

> "Mr. Lee: 'Q. Can you state what the intent of the board of directors was in adopting such resolution? A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.
>
> "He did a splendid piece of work, we felt.
>
> "Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift? A. No question about it."

(c) the testimony of Frederick E. Hasler, then Chairman of the Continental Bank and Trust Company, who voted for the resolution as a director of the operating company, who ratified it as a vestryman, and who now serves as Senior Warden of Trinity Church (R 41-42):

"Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the Board of Directors was at the time of the adoption of that resolution?

"Mr. Rita: I object on the ground that the witness is incompetent to so testify.

"The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

"Q. Mr. Hasler, this meeting took place in 1942. Could you possibly recall anything which you or any other member of the Board said at that time? A. Yes sir, we were all unanimous in wishing to make Mr. Stanton a gift.

"Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

"We understood that he was going in business for himself.

"We felt that he was entitled to that evidence of good will."

All legal and factual questions were stipulated except the nature of the $20,000 payment to Stanton (R 20, 69). Plaintiffs moved for summary judgment. The motion was denied in order to permit the government to have an opportunity to cross-examine (R 16).

As the facts set forth in Judge Abruzzo's memorandum denying the motion for summary judgment clearly show (R 12-16), the *only* question left for trial was the credibility of oral testimony.

The government produced no witness, and the testimony of the disinterested donor, through responsible witnesses, was that a gift was intended and made.

This testimony was believed by the trial court, as is evidenced by its decision (R 69, 70) rendered from the bench. Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1346 and 1402 (a) governing suits for refund of taxes illegally exacted.

Despite these findings of fact by the trial court, a majority of the Court of Appeals reversed over the dissenting opinion of Judge Hincks, who not only found the majority opinion to be in conflict with binding authority, but also to be beyond the power of an appellate court over findings by the trier of facts.

Reasons for Granting the Writ.

Summary.

1. The decision herein squarely and necessarily conflicts with this Court's holding and opinion in *Bogardus* v. *U. S.*, 302 U. S. 34.

It is just as contrary to the minority (for the reason set forth in paragraph numbered "2" following) in *Bogardus* as it is to the majority.

This case is in direct conflict with numerous decisions of other circuits, the Tax Court, and district courts.[3]

---

[3] The case at bar conflicts with the following, to name only a few:
Bounds v. *U. S.*, 262 F. 2d 876, C. A. 4;
Abernethy v. *C. I. R.*, 211 F. 2d 651, C. A. D. C.;
Schall v. *C. I. R.*, 174 F. 2d 893, C. A. 5;
Mutch v. *C. I. R.*, 209 F. 2d 390, C. A. 3;
Herschman v. *Kavanaugh* (E. D. Mich.), 120 F. Supp. 956; aff'd 210 F. 2d 654, C. A. 6;
Wright v. *C. I. R.*, 30 T. C. 392.

The section of the law involved is the cornerstone of the income tax law, defining as it does gross income and exclusions therefrom. The provision in the present Code is substantially the same as in prior Codes and, following Congressional reenactment, the departure of the Court of Appeals from accepted construction will precipitate an expanding flow of litigation, unless this Court restates its views.

Consideration by this Court of the substantive question at the present time is particularly appropriate, since some aspects of the question of "gifts", and their exclusion from gross income, are presently before the Court, *U. S.* v. *Kaiser*, No. 55, cert. granted 359 U. S. 1010.

Moreover, petition for certiorari is pending in *C. I. R.* v. *Duberstein, et al.* (Dkt. No. 376) presenting the same question of substantive law (in a different factual context, however), and the Solicitor General deems this *Stanton* case to be in conflict therewith as evidenced by his printing the opinions herein as an appendix to his *Duberstein* petition.

2. The majority below made an extraordinary departure from the legal and common-sense requirement that litigants try a case before a trial court, and the trial court's findings of fact stand unless clearly erroneous.

The majority opinion is replete with patent errors in the events described and their sequence, resulting from substituting the majority's weighing of the evidence for that of the trial judge.

The result of the majority opinion below, if allowed to stand, is to exclude tax cases from the purview of Rule 52 of the Federal Rules of Civil Procedure.

Discussion.

1. This Court held in *Bogardus:*

> "* * * a gift is nonetheless a gift because inspired by gratitude for * * * past faithful service * * *". (44)

Gifts to departing faithful stewards were held to be entirely proper and free of income tax.

In the case at bar, the majority held the payment not to be a gift because it was in "gratitude" for services rendered. And by way of emphasis, the majority noted

> "Indeed the resolution was 'in appreciation of the services rendered'* * *".

This is in explicit conflict with *Bogardus*. It is in verbatim conflict with *Abernethy, supra*, where the gift was voted "in appreciation of his long and faithful service".

Thus, over strong dissent, the majority were constrained to engraft an exception upon the statute—to hold gifts to departed faithful stewards to be taxable. This judge-made exception to a clear statute, previously construed by this Court, can no more be justified than could the engrafting of an exception to tax gifts to blood relatives as income, since they, according to the ancient formula, receive gifts in consideration of love and affection.

Surely the class of departed faithful stewards must be as numerous, or nearly so, as that of blood relatives, and there is no more statutory warrant for taxing gifts to the one than there is to the other.

Mr. Justice Brandeis agreed with the majority in *Bogardus*, except that, while he might have found a gift, had he been the trial judge, he could not disturb a contrary finding of fact. Therefore, no support for the majority below can be found in Mr. Justice Brandeis's dissent, for he believed that the trial court had evaluated "competing aims and motives" and drawn inferences which an appellate court could not disturb.

It was for this reason that Judge Hincks dissenting herein elected to quote freely from Mr. Justice Brandeis's dissenting opinion to illuminate most dramatically the conflict of this case with both opinions in *Bogardus*. In addi-

tion, Judge Hincks observed that Stanton's salary, fully paid through resignation, was nearly twice that of his successor, showing as clearly as could possibly be shown that the services had been fully "requited". "Full acquittance" having been given, and there being testimony corroborating the formal resolution with respect to personal liking, respect, admiration, and evidence of good will, Judge Hincks properly found all the requirements of Mr. Justice Brandeis's dissent fully satisfied in the record.

Two lower court cases called specifically to the attention of the court below should have prevented the error of the majority. For example, the Tax Court of the United States has happily expressed the standard in a situation where an attorney had successfully attacked the land laws of California which precluded ownership of real property by Japanese. Even though he received no compensation whatever for legal services, when persons of Japanese ancestry presented to him $10,000, the Tax Court properly found a gift was intended and that there was no taxable income to him. The Tax Court stated:

> "Respondent fails to distinguish between the motivating factor for making the payment and the intent with which the payment was made." *Wright* v. *C. I. R., supra,* p. 394.

The other case, *Abernethy,* and one referred to by the majority, is truly an identical case in that the church body voted payment "* * * in appreciation of his long and faithful service". Trinity Church in the case at bar voted payment to Stanton "in appreciation of the services rendered by Mr. Stanton . . . throughout nearly ten years". The purported distinction by the majority between religious and secular employees is both irrelevant and gratuitous and, as the dissenting opinion fully pointed out, Stanton was not isolated from personal contact with the vestry.

But rather than following such extraordinarily similar and helpful cases, the majority commenced its discussion of the law by referring to two of its own decisions which involved wholly different facts. Moreover, in both of such decisions, the appellate court affirmed the findings of fact of the trial court.

The majority referred to *Nickelsberg* v. *Commissioner*, 154 F. 2d 70, where a 74% stockholder received $7,500 as a "wedding gift" from the very entity which he dominated. Such a transparent contrivance did not commend itself to the Tax Court as creating a gift, and the findings of fact by the Tax Court were not set aside by the Court of Appeals.

Indeed, the *Nickelsberg* case more properly should have been referred to by the majority—not with respect to the question of statutory construction before the Court, but rather with respect to the refusal of the appellate court to disturb the findings of fact by the trial court. Such a case is clearly distinguishable from *Stanton*, where the recipient was never a vestryman; where he had terminated his employment relationship; and had no proprietary interest, as stockholder or otherwise, in Trinity Church and its wholly owned subsidiary. He therefore could never be considered to be in the same category as the majority stockholder-recipient in the *Nickelsberg* case.

Little light is cast upon the question by the other Second Circuit case referred to by the majority, *Carragan* v. *Commissioner*, 197 F. 2d 246, where an employee whose pay had been deliberately held down to a subsistence level to build up the assets of the company received additional compensation when interruptions of the Second World War made continuation of the company's business in the Far East impossible. Stanton, by contrast, received a salary of $22,500 per annum and resigned to go into business for himself.

Neither of such cases has any application to that at bar, and neither of them can justify the complete overturning of the standard established by Congress and construed by this Court in the *Bogardus* case.

It was at this point that the majority below undertook a discussion of the *Bogardus* case. The majority referred to the fortuitous events of corporate reorganization and found in them some special meaning which the majority believed to account for the result in that case. Judge Hincks' dissent takes issue with the majority on this point and believes the reference to the steps in reorganization to be purely incidental. In any event, whatever the corporate steps may have been in *Bogardus*, the majority contradicted themselves, because in the same paragraph of the opinion (A25), the majority ascribed significance to the fact that the donees "remain in the employ of 'Universal'," and then stated that "if 'Universal' had continued its business", the holding in *Bogardus* might have been different.

It is believed that the *Bogardus* case does not depend for its vitality upon the niceties of corporate reorganization, and that the dissenting opinion below properly recognized the significance of the case, as have all other courts of appeal which have referred to it. The majority opinion may possibly mean that, were Trinity Church and its subsidiary to have been dissolved, the result would have been different. But it is difficult to imagine how such an event has any real relevance to the problem.

Confusion was compounded at the end of the majority opinion where the Court then made a statement quoted below which, if taken literally, as it may well be in view of the importance and location of the Court which rendered it, is the most far-reaching statement in the entire opinion. It was by way of stating that the majority found its resolution of the problem unsatisfactory, but in doing so the Court went to the lengths of substituting the "taxing authorities"

for the district courts, and the Tax Court, and the Court of Claims for the purpose of determining facts.

The majority passed over entirely the fact that a trial judge, listening to witnesses upon the witness stand, had made a determination that the payment to Stanton was a gift. Such determination by the trial court is in accordance with elementary principles of tax law and every other kind of law known to our system. Nevertheless, the majority stated:

> "We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the *taxing authorities*, but it is, as we have tried to show, inherently incapable of exact definition and we can think of no better standard." (Emphasis supplied.)

This substitution of "taxing authorities" for the District Court is violative of every command of statute law, the Federal Rules, and indeed if intended to be taken literally would amount to an unconstitutional delegation of the legislative and judicial functions to the Executive Branch, affording a wholly independent ground for certiorari, or appeal on a constitutional question. Indeed, an example of the type of executive "legislation" we may expect from the "taxing authorities" is the widow and clergymen classifications (discussed *infra*, pp. 15-16) which have been established without benefit of the reasonableness generally ascribed to the Constitutional legislature.

At the risk of repetition, it is worth referring again to the *Abernethy* case where the minister was voted payments "in appreciation of the long and faithful service". Since Trinity Church in the case at bar voted payment to Stanton "in appreciation of" ten years of service by Mr. Stanton, the Government in the court below argued that widows and clergymen were in a different class. The majority below accepted this discrimination against temporal employees of a church and, disregarding the established construction and

the plain language of this Court which explicitly found that gratitude for past services could properly inspire a gift, has now excluded from the class of those to whom gifts may be made the faithful servant and the able steward, a class hitherto considered peculiarly eligible to participate in the generosity of those capable of expressing generosity with money or things of value.

There is no warrant in the statute for such exclusion. Indeed, in the court below, the Government's brief went to the extreme lengths of seeking to fragment the word "gift", which Congress did not choose to do, so that gifts to widows and gifts to clergymen could be considered to be such, but gifts to others, who might be engaged in the temporal affairs of a church could not be excluded from income.

By revenue ruling (Revenue Ruling 55-422), the Commissioner has stated that he will not attack gifts to clergymen and by press release of August 25, 1958[1] has stated

---

[1] The full text of the Information Release (T. I. R. No. 87, 586 CCH, para. 6662) reads as follows:

Quoted in *Bounds* v. *U. S.*, *supra*.

"In view of a number of adverse court decisions in cases involving voluntary payments to widows by their deceased husbands' employers, the Internal Revenue Service today announced that it will no longer litigate, under the Internal Revenue Code of 1939, cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or where the payments may be considered as dividends. Payments which will be considered 'voluntary' in applying this policy do not include payments made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband's death.

"In line with this new litigation policy, field offices in the Service will similarly dispose of 1939 Code cases not yet in litigation.

"The Service emphasized that this announcement represents a litigation policy, implemented by consistent administrative action, pertaining to 1939 Code cases only. The position of the Service with respect to cases in this area arising under the Internal Revenue Code of 1954 involves other considerations and will be made the subject of a future announcement."

a policy of not litigating gifts to widows. In view of such demonstrated proclivity on the part of the Government to subdivide and to fragment the plain word of Congress and to erode the opinion of this Court, it is clear that the majority opinion below calls for consideration by the Court in order to prevent further chaotic administration of a most important provision of the income tax law. Upon brief, a more detailed consideration of the conflict with *Bogardus* will be appropriate than the short outline in this petition.

Whether the statute be unevenly applied, as evidenced by such public announcements, or whether the plain word of Congress be subdivided without warrant as the Government argued below; in either case, corrective consideration by this Court is required. The result below tilts the hand of justice.

2. The opinion below represents such a startling departure from customary standards of appellate review of findings of fact as to furnish a wholly independent reason for granting the writ. If the "clearly erroneous doctrine" set forth in Rule 52 is not to be followed in tax cases, appellate courts will necessarily be inundated by litigation to the detriment of the revenue and to the impairment of administration—all working unfairness to taxpayers.

The trial court rendered its decision after hearing the witnesses in the courtroom. The basic finding of the trial court (R 69-70) that the payment was a gift was amply supported by the following proof, through oral evidence primarily, in the record:

> 1. The resolution of the Board of Directors of Trinity Operating Company, Inc., (all of whom were vestrymen of Trinity) which was ratified by the full vestry of Trinity Church, provided that the payment to Stanton was a gratuity, such resolution stating that

"a gratuity is hereby awarded to him of twenty thousand dollars".

2. Prior to Stanton's resignation he had been paid in full for all services rendered by him.

3. Two weeks after Stanton's resignation had been accepted, the resolution was adopted which awarded him the gift, and Stanton had no voice or control in the voting of the payment to him.

4. Stanton was not discharged, nor was the termination of employment made necessary by circumstances beyond his control. He desired to set up his own business. He was requested to reconsider his resignation and stay with Trinity.

5. Stanton did not do anything or refrain from doing anything or perform any services in connection with the gift to him, nor was any request made of him to do anything or refrain from doing anything.

6. There was no business purpose to be served nor any necessity for Trinity Church or its subsidiary to retain or obtain Stanton's good will in the future, and the payments to Stanton were not made with any such purpose in mind.

7. All of the stock of Trinity Operating Company, Inc. was owned by the Corporation of Trinity Church and the Church ratified the resolution and paid approximately half the gift.

8. The payments to Stanton were entered on the books of Trinity Operating Company, Inc. and the Corporation of Trinity Church as a gratuity.

9. No information returns were filed by Trinity Operating Company, Inc. or the Corporation of Trinity Church with respect to the payments to Stanton.

10. Trinity Operating Company, Inc. and the Corporation of Trinity Church did not withhold Victory or other income taxes with respect to the payments

made in 1943 as they would have been required to do had the payments been additional compensation for services. It was not necessary to withhold taxes if the payments were a gift.

11. Finally, the record consists of oral testimony explicitly describing the payment as a gift from disinterested donors.

Judge Hincks, dissenting below, stated:

> "Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52, 28 U. S. C. A. Findings by a trial judge, just as those by the Tax Court, may not be disturbed unless clearly erroneous. Plaut *v.* Munford, 2 Cir. 188 F. 2d 543; Smith *v.* Hoey, 2 Cir. 153 F. 2d 846; Scott *v.* Self, 8 Cir. 208 F. 2d 125; Smyth *v.* Barneson, 9 Cir. 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See United States *v.* Wells, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; Wickwire *v.* Reinecke, 275 U. S. 101, 48 S. Ct. 43, 72 L. Ed. 184; Blakeslee *v.* Smith, 2 Cir., 110 F. 2d 364; White *v.* Bingham, 1 Cir. 25 F. 2d 837; Jahn *v.* Pedrick, 2 Cir., 229 F. 2d 71; Keefe *v.* Cote, 1 Cir., 213 F. 2d 651. See also case note on Bogardus *v.* Helvering, 2 Cir., 88 F. 2d 646; 51 Harv. L. Rev. 167. In Peters *v.* Smith, supra, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside."

Commencing with the resolution itself, the formal act of a responsible institution which can be read only as effectuating a gift, the record is completely clear that the individuals who voted for such resolution did so with the intention that it be a gift and that it be given and received as an expression of personal affection, appreciation, respect, admiration and regard. It is therefore certain that the majority erred in its redetermination of facts, as the dis-

senting opinion so clearly points out. At the very least, there was before the trial court evidence from which a gift could properly have been inferred, and a gift was inferred. This is what the appellate court reversed.

The majority opinion is replete with patent errors, furnishing an object lesson in the wisdom of adhering to statutory limitations upon appellate review, and the expression thereof in Rule 52. Such errors include:

(a) Patent error in that the recital of facts of the majority opinion refers to Mr. Stanton's resignation and then states:

> "• • • and a few days previously the Operating Company had passed a resolution • • •."

In point of time, the situation was the *opposite*. That is, Stanton resigned. His resignation was accepted on November 5th. Two weeks thereafter on November 19th the gift was made by resolution. The majority apparently were misled by the fact that the effective date of Stanton's resignation was the end of the month. This error has materially influenced the majority in that the majority distinguished the authority of *Bogardus* upon the apparent ground that there the donating corporation had ceased having an employer-employee relationship with the donees. For that reason the patent error in the sequence of events appears to have been crucial, since no part of the gift was received until after Stanton had left Trinity.

(b) Another patent error is the misreading of a proviso in the donative resolution that Trinity Church was released from all rights and claims to pension and retirement benefits "not already *accrued* up to November 30, 1942" (emphasis added). That date was the effective date of the resignation submitted the early part of the month. The gratuity was received after November 30. The mistake is in overlooking the word "*accrued*". It is patently errone-

ous to find as a fact that a person who retained everything that had "*accrued*" gave up anything whatsoever, or, as the majority said, made "assurance doubly sure," especially when the uncontradicted testimony was that nothing was given up.

The proviso plainly means, and was notice to the world, including presumptive heirs, that the gift paid after resignation, gave rise to no *further* accruals of pension rights, thus emphasizing that the payment was a gift.

Without laboring the point here, it is apparent that the majority must again have been confused with respect to sequence of events, and it is patent that the word "accrued" was overlooked. This point, neither briefed nor argued below, resulted from the majority's making their own way through the evidence, without due deference to the trial judge.

(c) A third patent error is the majority's statement:

> "* * * there is no evidence that personal affection did enter into the payment * * *."

All the oral testimony bespeaks the contrary, as the dissent shows. True, the resolution is not effusive, nor is the testimony. The vestry and their counsel spoke in character. Their desire to be a benefactor was aptly expressed. The gift was effectuated decently and in order.

3. *Applicable to both reasons for granting the writ.*

The Government has elected to describe four determinants of what it calls the "gift-income dichotomy" in its brief in this Court in *Kaiser*. These are the headings in the Government's argument that strike benefits are not gifts (Govt. brief in *Kaiser*, pp. 25-33).

Irrespective of what may be the disposition of that case, the arguments have a direct application to this case. By

applying such identical determinants or criteria to the facts relating to Mr. Stanton's receipt of a gratuity from Trinity Church, the payment to him is shown to be a gift. Every single argument of the Government in *Kaiser* that strike benefits are not gifts is an argument that the gratuity to Stanton was a gift. The Government said strike benefits are not gifts:

(a) Because they were not made out of affection, respect, admiration, charity or like impulses. The entire record in this case and specifically Judge Hincks' dissenting opinion show the contrary to be true in Stanton's case.

(b) Because of the anticipated benefit to the union by encouraging continuation of the strike in support of the union's objective. There was no benefit anticipated to Trinity Church or its subsidiary by the payment to Stanton.

(c) Because given in exchange for the recipient's performance of acts requested by and of benefit to the union. Stanton performed no acts, did not forbear, and did nothing for the benefit of Trinity Church or its subsidiary.

(d) Because paid pursuant to an obligation that was not itself created by way of a gift. There was no obligation of any sort to make the payment to Stanton. Rather, out of the goodness of the hearts of the members of the vestry, acting as such and in their capacity as directors of the real estate subsidiary, the payment was made to Stanton as evidence of their good will.

All services to be performed by Stanton were fully performed and he was paid his entire salary of $22,500 per annum through the effective date of his resignation. He did not act nor did he refrain from acting as a result of the payment to him, nor was his conduct in any way affected by the gift, nor were any acts or forbearance requested by or required by Trinity Church.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted. If the petition is granted, the Court may wish to set this case (and the *Duberstein* case, if the petition therein is also granted) for argument together with *U. S.* v. *Kaiser*, No. 55.

Respectfully submitted,

BASIL O'CONNOR,
JOHN C. FARBER,
WILLIAM F. SNYDER,
CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

Of Counsel:

O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

APPENDIX.

Opinion of U. S. Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 329—October Term, 1958.

(Argued May 14, 1959 Decided July 6, 1959.)

Docket No. 25569

ALDEN D. STANTON and LOUISE M. STANTON,

Appellees,

v.

UNITED STATES OF AMERICA,

Appellant.

Before:

HAND, SWAN and HINCKS,
Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Byers, J., presiding), granting judgment to the plaintiffs for the refund of an income tax for the year 1943, with interest.

HOWARD HEFFRON, for the appellant.

CLENDON H. LEE, for the appellees.

HAND, Circuit Judge:

The plaintiffs sue to secure a refund of $15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In

1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was $22,500. In November, 1943, he voluntarily resigned as Comptroller, and as president and director of the Operating Company, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars * * * provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of $10,629.57. The plaintiffs eventually paid this with accumulated interest, $15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although the donee had no right to enforce its payment. The last of our decisions in *Carragan* v. *Commissioner*, 197 Fed. (2)

246, 248, so declares and in *Nickelsberg* v. *Commissioner*, 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus* v. *Commissioner*, 302 U. S. 34, is the only decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only $4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus acquired." "Unopco" made a general distribution as a "gift" or "honorarium" of $600,000 to all the former employees of "Universal," of which the plaintiff's share was $10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. In the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was

thought to have no such rights; but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in deciding whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus* v. *Commissioner, supra*, at times it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham* v. *Commissioner*, 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support an action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitative terms of whatever financial gains the pastor may have contributed to the corporation. *Schall* v. *Commissioner*, 174 Fed. (2) 893 (C. A. 5); *Mutch* v. *Commissioner*, 209 Fed. (2) 390 (C. A. 3); *Abernethy* v. *Commissioner*, 211 Fed. (2) 651 (C. A. D. C.). We cannot say positively that in the case at bar this second factor may not have had any place in the action of the board of directors of the Operating Company; but, since Mr. Stanton's

duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Commissioner's determination is wrong. *Welch* v. *Helvering*, 290 U. S. 111, 115; *Helvering* v. *Taylor*, 293 U. S. 507, 515; his decision is prima facie correct; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, Circuit Judge (dissenting):

In *Helvering* v. *American Dental Co.*, 318 U. S. 322, 327, it was said: "The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus* v. *Commissioner*, 302 U. S. 34, on the one side and upon the other by *Noel* v. *Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co.* v. *Commissioner*, 257 U. S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel*.

In *Bogardus* v. *Commissioner*, 302 U. S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the dis-

bursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there *might be ground for the inference* that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would *necessarily* have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646, at 648-9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donees, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

In the *Noel* case, referred to in *Helvering* v. *American Dental Co.*, *supra*, as illuminating the dividing line from the other side, there were factors, not present here, which cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration." Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

> "• • • What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.
>
> "We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481."

In the case now before us a search "among competing aims or motives [for] the ones that dominated conduct" will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton into close personal contact* with the vestry and wardens

* Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of "good will, esteem, or kindliness" than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

of the church and with the directors of the Operating Company several of whom testified that a general feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate;** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindliness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus*, rather than more complete requital for past services, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general finding below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is *not* so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters* v. *Smith*, 3 Cir. 221 F. 2d 721; *Nickelsburg* v. *Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the

---

** It was almost twice that later provided for his successor.

Tax Court,* may not be disturbed unless clearly erroneous. *Plaut* v. *Munford*, 2 Cir., 188 F. 2d 543; *Smith* v. *Hoey*, 2 Cir., 153 F. 2d 846; *Scott* v. *Self*, 5 Cir., 208 F. 2d 125; *Smythe* v. *Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States* v. *Wells*, 283 U. S. 102; *Wickwire* v. *Reinecke*, 275 U. S. 101; *Blakeslee* v. *Smith*, 2 Cir., 110 F. 2d 364; *White* v. *Bingham*, 1 Cir., 25 F. 2d 837; *Jahn* v. *Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe* v. *Cote*, 1 Cir., 213 F. 651. See also case note on *Bogardus* v. *Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters* v. *Smith*, *supra*, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appellate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, and *Nickelsburg* v. *Commissioner*, *supra*, are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

---

* 26 U. S. C. A. §7482(a) provides

"(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; * * *."

Judgment.

(Filed July 6, 1959.)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record for the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this Court.